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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 484.

THE CONNECTICUT MUTUAL LIFE INSURANCE CO., PLAINTIFF IN ERROR,

vs.

LINDA Y. SPRATLEY, DEFENDANT IN ERROR.

MOTIONS TO DISMISS OR AFFIRM, STATEMENT OF CASE, AND BRIEF FOR MRS. LINDA Y. SPRATLEY, DEFENDANT IN ERROR.

THOS. B. TURLEY,
L. E. WRIGHT,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-11-'98

IN THE

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THE CONNECTICUT MUTUAL LIFE INSURANCE CO., PLAINTIFF IN ERROR,

vs.

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Motions by Defendant in Error to Dismiss or Affirm under Fifth Clause of Rule 6.

Linda Y. Spratley, the defendant in error, moves the court to dismiss the writ of error herein because there has been no return of the original writ of error and because the writ of error and citation were made returnable more than thirty days from the day of the signing of the citation.

In support of this motion the defendant in error shows that this is a case brought to this court by writ of error to the supreme court of Tennessee to reverse a decree rendered by that court in favor of defendant in error and against the plaintiff in error. The decree of the supreme court of Ten-

nessee was rendered on the 16th day of June, 1897 (Record, p. 45). The writ of error issued on the 24th day of July, 1897 (Record, p. 50). The original writ has never been returned. A copy has been substituted in its place. The citation was signed on the 24th day of July, 1897, and is returnable on the second Monday in November, 1897 (Record, p. 54). The writ of error is returnable on the second Monday in October, 1897 (Record, p. 50). The record was filed in this court on the 18th day of October, 1897.

Under the first clause of rule 8 the clerk of the court to which any writ of error may be directed is required to make return of same; and under the fifth clause of rule 8 all appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Defendant in error submits that the writ of error herein should be dismissed because the above provisions of rule 8 have not been complied with.

And, in the event the motion to dismiss is denied, defendant in error moves the court to affirm the decree of the supreme court of Tennessee on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ of error was taken for delay only.

In support of this motion and as a part thereof defendant in error submits a brief setting forth a statement of the case and the points involved, both of law and fact, with a reference to the pages of the record and the authorities bearing on each point.

THOS. B. TURLEY,

L. E. WRIGHT,

Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1897.

CONNECTICUT MUTUAL LIFE INSURANCE CO.
vs.
LINDA Y. SPRATLEY.
No. 484.

STATEMENT OF CASE AND BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This was a bill filed in the chancery court of Shelby county, Tennessee, part 1, on the 10th day of October, 1896, to enjoin garnishment proceedings upon a judgment which was obtained by Mrs. Linda Y. Spratley against the complainant, The Connecticut Mutual Life Insurance Co., in the circuit court of Shelby county, Tennessee, on or about the 2d day of July, 1896, upon two policies of insurance issued by the complainant insurance company on the life of Benjamin R. Spratley, husband of the said Linda Y. Spratley, aggregating $8,000, and to vacate and set aside the judgment.

It is shown by the bill that Linda Y. Spratley had caused an execution to be issued on said judgment, and that she had had the sheriff of Shelby county, Tennessee, to garnishee various policy-holders of the complainant company residing in the State of Tennessee to answer what they owed said company.

The equity set up in the bill is that complainant company was not before the court in said circuit court proceedings, either by publication or service, and that hence the judgment was absolutely void.

The bill charges that the circuit court proceedings were prosecuted under the provisions of an act of the legislature of Tennessee, entitled "An act to subject foreign corpora-

tions to suit in this State," approved March 29, 1887, found on pages 386 *et seq.* of the act of 1887.

This act is copied at end of brief. (See page —.)

It then charges that said act of the legislature is null and void because it violates both the constitution of the State of Tennessee and the Constitution of the United States, and that hence the circuit court proceedings in which said judgment was rendered are void. The bill also charges that said judgment was rendered without regular service of process and was *coram non judice;* that complainant company was a non-resident of the State of Tennessee and had no regular office or agency in Shelby county, Tennessee, and had no office or agent in Tennessee for some years preceding the institution of the suit in the circuit court; that it had done no business in Tennessee and had no agent or office within the State for several years preceding said suit, and that the circuit court of Shelby county was without jurisdiction to entertain the suit and to render said judgment. But the equity set up as the ground upon which the right to relief is put, as will be seen from reading the whole bill, is, that said act of 1887 is unconstitutional and void. The bill will be found at pages 1 to 4 of Record. An interlocutory injunction was granted in accordance with the prayer of the bill.

See Record, p. 7.

Defendant, Linda Y. Spratley, first moved to dissolve the injunction upon the face of the bill. This motion will be found on pages 8 and 9 of the Record.

Upon argument, the motion to dissolve was overruled and disallowed.

See Record, p. 9.

Linda Y. Spratley then answered the bill. The answer puts in issue the allegations of the bill and sets up that the complainant company was amenable to suit under the act of

1887; that said act was valid and constitutional; that the proceedings in the circuit court were in all respects regular, and that complainant company was properly before the said court, and that the judgment rendered against it in her favor was in all respects a valid judgment. The answer will be found on pages 9 to 13 of Record. Proof was then taken. There is practically no dispute as to the facts.

It appears from the proof that complainant company did prosecute its business actively in the State of Tennessee from February 1, 1870, to July 1, 1894. During all this period it was seeking insurance in this State and issuing policies to its citizens. Its agency was located at Memphis, Tennessee. During said period it also complied with the laws of Tennessee regulating the manner in which foreign life insurance companies could do business in this State. It kept an agency in the city of Memphis, Tennessee, until about December, 1878, when the office of the agency was removed to Louisville, Kentucky. Mr. J. S. Carpenter, the agent who had represented it in Tennessee, continued to represent it at Louisville, and still represents it at that place.

Up to July 1, 1894, his territory as agent embraced both Kentucky and Tennessee, and he actively prosecuted the business of soliciting insurance both in Kentucky and Tennessee. All of these facts will appear from the deposition of John M. Taylor, vice-president of complainant company.

Record, pp. 14 to 19.

On the 17th of March, 1876, complainant company filed with the secretary of state of Tennessee a power of attorney authorizing him to accept service for said company in this State. A copy of said power of attorney will be found on pages 21 and 22 of Record. While the complainant was actively prosecuting its business in Tennessee, its agent, J. S. Carpenter, after 1878, made different visits to Memphis, Tennessee, for the purpose of soliciting insurance in that city. One of these visits was about December 12, 1889. On

this visit he induced Mr. Benjamin R. Spratley to apply for a policy of $5,000 in complainant company, payable to his wife, Linda Y. Spratley, and on a subsequent visit, made about the 25th of February, 1893, he procured from Benjamin R. Spratley an application for an additional policy of $3,000 in complainant company, payable to the said Linda Y. Spratley.

The applications for both these policies were taken by Carpenter in the city of Memphis, Tennessee, and the policies were delivered to Mrs. Spratley in that city.

All this appears from the deposition of S. J. York, which will be found on pages 29 to 31 of Record.

After complainant company ceased to seek new insurance in Tennessee, it continued to receive and collect premiums on the policies outstanding in this State, and to adjust death losses in the State. As appears from the garnishment proceedings (see Record, pp. 2 to 4) it still has a considerable number of policies outstanding in this State.

Benjamin R. Spratley died in February, 1896. Proofs of death were made out in Tennessee under the policies and forwarded to complainant company. Thereupon complainant company sent one of its employés, a Mr. O. N. Chaffee, in April, 1896, to Memphis to investigate the claim which was being made by Linda Y. Spratley upon the two policies issued by complainant company on her husband's life in her favor.

See deposition of S. J. York, pp. 29 to 30 of Record.
And of O. N. Chaffee, pp. 26, 27 of Record.

O. N. Chaffee was an employé of said complainant company, whose duty it was to investigate doubtful or questionable claims and to report facts to the company.

See testimony of Jno. N. Taylor, pp. 16–20 of Record.

By the terms of his written employment he was engaged "for special service in any matters which might be referred to him, with instructions, during the pleasure of the com-

plainant company, and under the directions of its executive officers, complainant company to have his entire time and services, except upon leave of absence."

Record, pp. 22, 23.

While Mr. Chaffee was in Memphis he had negotiations with Mrs. Linda Y. Spratley and her brother, S. J. York, looking to a settlement of Mrs. Spratley's claim on said two policies.

See York's testimony, pp. 29, 30 of Record.

While Chaffee was here this suit was instituted in the circuit court and service was had on him under the act of 1887. All the provisions of said act were strictly complied with, and a regular judgment by default was taken in the circuit court proceedings in favor of Linda Y. Spratley against complainant company for the full amount of said two policies and interest.

For these proceedings see Record, pp. 31 to 36.

Upon final hearing the chancellor sustained the bill and made the interlocutory injunction perpetual.

The decree of State chancery court will be found on pages 37 and 38 of the Record.

From this decree Mrs. Spratley appealed to the State supreme court. That court, at its April term, 1897, reversed the decree of the chancery court and gave judgment against the insurance company for the full amount of the policies and interest. The insurance company now brings the case to this court.

Record, pp. 45, 47.

BRIEF AND ARGUMENT.

The only question involved in this case is as to the validity of the judgment rendered in the circuit court in favor of the defendant, Linda Y. Spratley, and against the complainant company. If the judgment is void for want of service, then it will be vacated; and if the service was valid, it will be maintained. No inquiry can be made into the question of whether the defendant company had a meritorious defense to the policies if such defense had been set up in the suit on said policies. The validity of the judgment depends upon the validity of the service.

I.

We will notice first the point made in the bill as to the mistake in the name of the agent on whom the service was had.

The bill charges that the writ was served on "O. N. Chaffer," special agent, etc., but when the records of the circuit court are examined it will be found that this is an error, and that the service was had upon the agent by his proper name, O. N. Chaffee. It may be that in writing out the judgment the clerk of the circuit court made a mistake in the agent's name and wrote it "Chaffer," but such a mistake is immaterial. A misnomer of this kind, even in the service of a writ, is immaterial.

See—

Dixon *vs.* Kavanaugh, 1 Tenn., 366.
Graham *vs.* Roberts, 1 Head, 59, 60.
Robertson *vs.* Winchester, 1 Pick., 171.

II.

This brings us to a construction of chapter 226 of the Acts of 1887.

Prior to the passage of this act the legislation of Tennessee regulating the service of process on corporations, foreign or domestic, was about as follows:

We had, as we still have, the Code provisions, sections 3536 to 3539, M. & V. Code; 2831 to 2834, old Code.

These sections designate the officers upon whom service is to be made, and apply either to domestic or foreign corporations, having an office or agency and a resident local office in the county in which suit is brought.

4 Pickle, 267.

Afterwards, and beginning in 1873, acts were passed regulating the manner in which and describing the terms on which foreign life and fire insurance companies might do business in Tennessee. Chapter 23 of the Acts of 1873, section 2, required foreign fire insurance companies to file with the treasurer of the State a written instrument authorizing any agent of such company in the State to acknowledge service of process and also waiving any claim or right to transfer any case pending in the courts of Tennessee to the courts of the United States.

Chapter 66 of the Acts of 1875, section 12, required foreign life insurance companies to file with the insurance commissioner a power of attorney authorizing the secretary of state to accept service. Chapter 23 of the Acts of 1873 was repealed by chapter 47 of the Acts of 1891, and chapter 66 of the Acts of 1875, as well as chapter 47 of the Acts of 1891, were repealed by chapter 160, section 49, of the Acts of 1895.

All these repeals were express.

The suit brought by Mrs. Linda Y. Spratley in the circuit court was instituted on the 15th day of April, 1896. At

that time chapter 66 of the Acts of 1875, under which the complainant life insurance company had filed a power of attorney authorizing the secretary of state to accept service for it, had been repealed, and with the repeal the power of attorney was abrogated.

Chapter 160 of the Acts of 1895, which repeals said chapter 66 of the Acts of 1875, in section 9, contains a provision requiring every foreign insurance company, fire or life, as a prerequisite to being admitted and authorized to do business in the State of Tennessee, to constitute the insurance commissioner its attorney-in-fact to accept service.

It is not claimed that the complainant insurance company ever attempted to comply with this act of 1895. From July 1, 1894, down to the time the suit in the circuit court was brought complainant insurance company was doing a limited business in Tennessee. It had a large number of policies in this State from which it collected its premiums at stated periods, and when a death occurred it sent its agents into the State to make the necessary investigation and report upon the circumstances under which the insured party died.

Chapter 226 of the Acts of 1887 was construed by this court in the case of Tel. Co. *vs.* Turner, 4 Pickle, 266. In that case the court points out that in 9 Lea, 475, it had been held that the sections of the Code, 2831 and 2834, referred to above, did not apply to the case of a foreign corporation having no resident agent or local agent, but which was alone represented by traveling agents, not residents of this State. The court then goes on to say—

"That chapter 226 of the Acts of 1887 was passed to amend this defect, and that it did not repeal the sections of the Code mentioned above, but enlarged the Code provisions, and applied to foreign corporations having business in the State through traveling agents, and being without any resident agent or local office in the State."

Now, when the suit in the circuit court was brought, the only law under which it could be prosecuted was chapter 226 of the Acts of 1887. The Code provisions, 2831 and 2834, referred to above, did not apply, for the reason stated in Tel. Co. *vs.* Turner. The complainant company had no local office or agent in Tennessee, but was transacting such business as it had in the State through traveling agents alone. Chapter 66 of the Acts of 1875 did not apply, because it had been repealed; and chapter 166 of the Acts of 1895 was without application, because the complainant company had never complied with its terms, and was not seeking to do business under its provisions.

The first section of chapter 226 of the Acts of 1887 provided that "any foreign corporation found doing business in this State shall be subject to suit here to the same extent as domestic corporations, so far as relates to any transaction had in whole or in part within this State, or any cause of action arising here, but not otherwise." The second section provides that "any corporation having any transaction with persons, or having any transaction concerning property in this State through any agency whatever acting for it within the State, shall be held to be doing business in the State within the meaning of the act." The third section makes it clear that "any corporation which has had transactions within the State with persons or concerning property in the State is liable to suit under the act, even though it may never have had any other or subsequent transaction with persons in the State or about property in the State, for it provides that process in such cases may be served upon any agent of such corporation found within the county where the suit is brought, no matter what character of agent such person may be;" and it is further provided that if there is no such agent in the county, "it will be sufficient to serve process upon any person found in the county who represented the corporation at the time the transaction out of which the suit arose took place."

O. N. Chaffee, the person upon whom service was had in the circuit court proceedings, was clearly an agent of the company. The bill itself admits he was a special agent of the company.

See Record, pp. 2 and 3.

Vice-President Taylor testified that he was an agent to investigate all claims that were considered doubtful by the complainant company.

See Record, pp. 16, 20.

And when the process was served on him in the circuit court proceedings he was in Memphis, representing the complainant company and investigating the claim then being made by Linda Y. Spratley on the two policies which were the subject-matter of suit in the circuit court.

Section 3 of chapter 226, Acts of 1887, as already stated, allows service to be made "upon any agent, no matter what character of agent such person may be."

The suit in the circuit court was in reference to a transaction had at least in part, if not entirely, in the State of Tennessee. Complainant company was constantly having transactions with persons in the State of Tennessee in the sense of section 2 of said chapter 226, Acts of 1887. It was keeping up its insurance contracts with citizens of Tennessee, sending notices to its policy-holders in Tennessee, and receiving premiums from them, and it was sending its agents into the State of Tennessee to examine claims made against it.

The unreported case of Kosminsky *vs.* Arlington Insurance Co., decided by the supreme court of Tennessee at its April term, 1896, is instructive on the point now under consideration.

In that case the Arlington Insurance Company had issued only one policy in the State of Arkansaw. That policy was issued at the home office of the Arlington Insurance Company, in Memphis, upon the application of a broker living

in Arkansaw and was sent to the broker in Arkansaw and was delivered by said broker to the insured, who resided in that State. The broker had no authority to act for the company or to bind it by any agreement of insurance, nor had he any authority to accept any application for the company. In other words, the broker did not represent the company in any way. This was the only transaction the company ever had in the State of Arkansaw. Beyond this one transaction it never attempted to do business in that State and never complied with its laws.

The statutes of Arkansaw provide that any foreign insurance company doing business in that State can be sued there, and points out the manner in which service shall be made.

The supreme court of Tennessee held that the Arlington Insurance Company by the issuance of one policy in the State of Arkansaw was doing business therein and subject to be sued on that policy under the provisions of the Arkansaw statute.

See also on this point:

32 Fed. Rep., 276; 46 Fed. Rep., 442.
48 Fed. Rep., 205; 55 Fed. Rep., 28.
1 Fed. Rep., 471; 31 N. W., 231.

III.

We have thus argued the question of misnomer in the judgment, and also the scope and effect of the act of 1887, and whether the company was subject to suit thereunder.

But we submit that when the bill is carefully examined it will be seen that the only question raised by it is as to whether or not said act of 1887 is constitutional.

After making the point of misnomer and alleging that it had done no business in Tennessee and had no agency therein for several years prior to the institution of the suit

in the circuit court, complainant company plants its right to relief upon the allegation that the act of 1887 is violative both of the Constitution of Tennessee and of the United States, and the prayer of the bill is that said act may be declared unconstitutional and the judgment rendered in the circuit court proceedings under it be declared void. We insist, therefore, that the only question which the court can consider under complainant's bill is the question of the constitutionality or unconstitutionality of said act.

We now proceed to discuss that question.

The bill charges that said act violates article 5 and article 14 of the amendments to the Constitution of the United States, and section 17, article 1, of the constitution of Tennessee. These provisions of the Constitution of the United States and of the constitution of this State, we submit, have never by any court been considered as having any application to State statutes regulating the manner in which process may be served on foreign corporations attempting to do business within the States passing such statutes.

In enacting the statutes of 1887, Tennessee has but followed the footsteps of most of the other States. Scarcely a State in the Union can be found which is without laws of this kind on its statute book. Every State has found it necessary to enact them in order to protect its citizens against foreign corporations, who enter its territory, make contracts with its subjects, and then attempt to evade compliance with such contracts, relying on the hope that it will not be followed to the State in which it was created, and sued there. As explained by Judge Coldwell in the case of Ehrman *vs.* Teutonia Ins. Co., 1 Fed. Rep., 475:

"The leading provisions of these acts are for the protection of policy-holders."

The Supreme Court of the United States has given the same interpretation to this class of legislation. Speaking

of a statute of this kind, passed in the State of Ohio, it says:

"We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio would endeavor to secure its citizens a remedy in their domestic forum upon this important class of contracts, made and to be performed within that State and fully subject to its laws; nor that proper means be used to compel foreign corporations transacting this business of insurance within the State, for their benefit and profit, to answer there for breach of their contracts of insurance there made and to be performed."

Lafayette Ins. Co. *vs.* French, 18 How., 404.

And in a later case the same court says—

"That if there could be no special redress short of the seat of the company in another State, the cost of the remedy would in most instances exceed the value of its fruits. The result would be to a large extent immunity from all legal responsibility."

R. R. *vs.* Harris, 12 Wall., 65.

How applicable are these words of the learned Supreme Court of the United States to our Tennessee statute and to the facts of this particular case.

Here the complainant company came into Tennessee, by its agent, solicited insurance upon the life of Mr. Spratley, made the contracts with him in Tennessee, and delivered the policies to him in Tennessee. Upon the death of Mr. Spratley, it sent its agent into Tennessee to look into the question of adjustment of these policies. A difference having arisen between complainant and Mrs. Spratley, the beneficiary, complainant instantly repudiates the Tennessee jurisdiction and insists that Mrs. Spratley follow it into the distant State of Connecticut and there prosecute her claim for her redress.

This court, we submit, in view of our legislation on this subject, will not sustain such a proposition.

The constitutional principle invoked on behalf of complainant company is not applicable to the questions now under discussion. It has been practically settled since the foundation of the Government that corporations created under the laws of one State have no absolute right to do business in another State without the consent, express or implied, of the latter State. This consent may be given on such terms as the State may think fit to impose, and these conditions are binding on the company, and effect will be given them in the courts of all States and the United States.

Lafayette Ins. Co. *vs.* French, 18 How., 404.
Paul *vs.* Virginia, 8 Wall., 168.
R. R. *vs.* Harris, 12 Wall., 65.

If the conditions imposed are too onerous for any particular company, it can abstain from doing business in the State imposing them. It has no right to go there. It has no inherent and constitutional right, so far as the questions under discussion are concerned, out of the State which gives it life. It has no right to come into any court or any tribunal and insist that a State different from that in which it is created shall be compelled to pass laws which suit its notions of right and justice.

The cases cited for complainant on this branch of the discussion when analyzed afford no support for its position. Of these cases, the first is—

Penoyer *vs.* Neff, 95 U. S., 714.

In this case a statute of Oregon, under certain circumstances, authorized personal judgment to be taken against non-resident citizens, upon publication and without any kind of service. The Supreme Court of the United States held that such a judgment was absolutely void. The case did not in any aspect involve the validity of service had

upon an agent of a non-resident corporation under the statute of a State where the service was made.

Another case cited for complainant is—

St. Clair *vs.* Cox, 106 U. S., 350.

This was a case construing a statute of Michigan providing for service upon foreign corporations. The statute in question provided for attaching property of foreign corporations by service of copy of the writ, etc., on any officer, member, clerk, or agent of such corporation within the State. An attachment was sued out by a resident of Michigan against a foreign corporation, and the sheriff returned that he had served it on one Caldwell, as the agent of said corporation. Neither the record itself nor the return of the sheriff recited or showed that the corporation was or had been engaged in any kind of business in Michigan, or that the person upon whom the service was had was at the time acting as the agent of the corporation in the State of Michigan and representing it in connection with business it had there. For these defects in the record the service was held bad, and the judgment entered therein was set aside.

The record in our case is free from these defects. The declaration, the return of the sheriff, and the judgment entered in the circuit court, all show that the complainant was doing business in Tennessee; that the policies sued on were issued in Tennessee, and that Chaffee, the agent, was representing the company in Tennessee in connection with these very policies at the time the service was had.

If the Michigan record had contained the same averments and recitals as our record, the case of St. Clair *vs.* Cox would have been decided very differently.

But when the opinion of the court, as delivered by Judge Fields, is looked into, it will be seen that it is strongly in our favor. We quote for the benefit of the court certain portions of said opinion. On page 356 this language is used:

"A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in La Fayette Ins. Co. *vs.* French, 'These conditions must be deemed valid and effectual by the other States and by this court, provided they are not repugnant to the Constitution or laws of the United States or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity of defense,'" citing—

18 How., 404, 407.

Paul *vs.* Virginia, 8 Wall., 168.

In the case at bar there is certainly nothing inconsistent with "that principle of natural justice which forbids condemnation without opportunity for defense."

The agent of complainant was notified, and complainant itself was also given full information of the suit. Copy of the writ and return were sent to its home office. It is not claimed, and cannot be claimed, that it did not have full opportunity to make its defense in the circuit court. It chose deliberately to risk its case upon the supposed invalidity of the Tennessee statute of 1887. This statute, we may pause here to notice, is more careful to comply with the "principle of natural justice" referred to above than the statutes of almost any other State. It does not stop with the service upon the agent, but requires both the clerk of the court and the attorneys for the plaintiff to send full information of the suit to the defendant corporation at its home office. It would be impossible to conceive a statute containing greater safeguards against any violation of the principle of natural justice which demands that every party when sued should have his day in court and full opportunity to present his defense.

But, recurring to the opinion of the court in said case of

St. Clair *vs.* Cox, and further quoting from page 356, we find this language:

"The State can therefore impose as a condition upon which foreign corporations shall be permitted to do business within her limits that it shall stipulate that in any litigation arising out of its transactions in the State it will accept as sufficient the service of process on its agents or person specially designated, and the conditions would be eminently fit and just, and such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of permission, *and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process.*"

How applicable again is this doctrine to our case.

The Tennessee statute of 1887 provides for service on agents found in Tennessee in suits against foreign corporations for business here done. This statute was passed long before complainant came into Tennessee and issued its policies upon the life of Benjamin R. Spratley. It thereby assented to the conditions of the act of 1887 as fully as though it had specially authorized any agent it afterwards sent into Tennessee to receive service of process in any suit growing out of these Spratley policies.

If the agent, Chaffee, had been traveling through Tennessee on his private business and not in the character of agent of complainant, then service could not have been had upon him; but the bill admits that he was here as the agent of complainant, upon complainant's business. It is true the bill says it was special business, but still it was the business of complainant. The circuit court record showed that he was here representing complainant in connection with the policies sued on.

Railroad Co. *vs.* Pinkey, 149 U. S., 194, went off on the

ground that the person served was not really the agent of the corporation sued; but we again repeat that the person here served was the agent of the corporation and was engaged in its business at the time.

The case of the U. S. *vs.* Am. Bell Tel. Co., 29 Fed. Rep., p. 17 *et seq.*, is another case cited for complainant. This case grew out of an Ohio statute which allows service on the managing agent in Ohio of any foreign corporation. In the record there presented it did not appear that the person served was the managing agent of defendant corporation—indeed, the court found that he was not an agent at all. The three conditions laid down by Judge Jackson in the opinion in this case, and which are cited in the brief for complainant, are shown to exist in the record in the case at bar. That record recites, first, that complainant was doing business in Tennessee; second, that it had an agent who was here at the time service was had, and who was representing it at that time in this State; third, it shows the existence of the local law making the corporation amenable to suit in this State. When the record of the circuit court and the bill filed in the case, together with the garnishments which were issued, are taken into consideration, it shows that complainant had a very large business in Tennessee. The existence of probably fifteen or twenty policies in this State is disclosed. Thus the complainant is shown to have outstanding running policies in existence in this State, and to be constantly collecting money from the citizens in this State. How could there be a clearer case of doing business?

REPLY TO CERTAIN POINTS RELIED ON BY THE INSURANCE COMPANY IN THE COURTS BELOW.

I.

Counsel for the insurance company denied the proposition that chapter 66 of Acts of 1875 was repealed by section 49, chapter 160, of the Acts of 1895. He said that the act of 1875 contains no provision for service of process on the secretary of state as the agent of foreign insurance companies complying with said act; that it only authorizes the secretary of state to acknowledge service for such companies; hence, he says, that the repeal of the act of 1875 involves no question of process.

Certainly, the act of 1895 repeals all of chapter 66 of the Acts of 1875 in express terms.

The question then arises, What is the effect of this repeal? There is much learning in the books upon the general question of the effect of the repeal of statutes. We have been unable, however, to find up to this time any case the facts of which are like those in the case at bar; but much light may be gained by analogy from an investigation of certain principles which seem to be well established by the decided cases and by the views of the best text-writers.

Acts of the legislature like those under consideration are intended to give jurisdiction to the local courts and to prescribe the methods by which a certain class of parties, viz., foreign corporations, can be brought before them. They are acts regulating civil proceedings and conferring civil jurisdiction.

The principle seems to be thoroughly established, almost without a break in the authorities, that where civil proceedings or jurisdictions in civil cases depend upon a statute they fall within the repeal of that statute.

See Enlich on Interpretation of Statutes, sec. 479 and notes.

Thus where a commissioner to whom a case was referred under a statute made his report after the repeal of the statute, it was held that the court could not act on the report; and so, too, where a foreign attachment was issued under an act and the act was repealed before the attachment proceedings were finally concluded, it was held that the proceedings were vacated by the repeal of the act. See—

North Cabal St. *vs.* Road, 10 Watts (Pa.), 351.
State *vs.* Brookover, 22 W. Va., 214.
Stephenson *vs.* Doe, 8 Blackford (Ind.), 508.
Rex *vs.* Morris, 2 B. and Ab., 441.

A verdict was rendered for one shilling. Under an act then in existence the presiding judge could, by granting a certificate, deprive plaintiff getting such a verdict of all costs. The certificate was not granted until after the act was repealed. Held, that the certificate came too late.

Morgan *vs.* Thorn, 7 M and W., 400.

An act gave the right to acquire a mechanic's lien. Proceedings to fix the lien were instituted, but before they were completed the act was repealed. Held, that the repeal of the act destroyed the proceedings and no lien could be acquired.

So, too, an act authorizing a mortgagee to redeem within the year from date of sale. Before the expiration of the year the act was repealed. Held, that the right to redeem was lost.

An act authorized the opening of streets, directed the damages to be paid by the owners of lots benefited by the opening, and gave a remedy to enforce the collection of such damages. Certain streets were opened under this act, and proceedings were instituted against the owners of lots benefited thereby to collect damages. Before said proceedings were consummated by final judgment the act was repealed.

Held, that the right to recover damages, as well as the obligation to pay same, fell with the act.

Enlich on Interpretation of Statutes, sec 480.
Bailey *vs.* Mason, 4 Minn., 546.
Butler *vs.* Palmer, 1 Hill, N. Y., 324.
Hampton *vs.* Commonwealth, 10 Pa. Stat, 329.

The repeal of an act which authorizes a course of proceedings by public officials invalidates all unfinished proceedings under said act, no matter how near they may be to completion at the time of repeal.

Williams *vs.* Lincoln Co., 35 Me., 345.
Tivey *vs.* People, 8 Mich., 128.
Lamb *vs.* Schotter, 54 Cal., 319.
Hampton *vs.* Commonwealth, 19 Pa. Stat., 329.

The repeal of a statute abrogates it as completely as if it had never existed, and all actions and proceedings pending under it fall with the repeal.

Anding *vs.* Levy, 57 Miss., 58.

The act of 1895, in addition to expressly repealing the act of 1875, provides a different method for acquiring jurisdiction over foreign insurance companies doing business in this State. The act of 1875, as already stated, required foreign life insurance companies to file with the insurance commissioner a power of attorney authorizing the secretary of state to accept service. The act of 1895, pp. 326 and 327, requires every foreign insurance company to appoint the insurance commissioner its agent, upon whom all lawful process may be served. In the repealed act the secretary of state was to be authorized to accept service; in the repealing act the insurance commissioner is to be constituted an agent upon whom process may be served.

The two acts point out different officers to act as agents.

In the one act the officer is to accept service; in the other, process is to be served upon him. We do not think this latter difference very material, but still it is a distinction in favor of the position for which we contend.

Counsel for appellee, as shown, seems to think the distinction an important one. We repeat again, whether important or not, its effect, so far as it goes, operates in our favor, for it requires *some affirmative act on the part of the official to accept service.* It is a duty which he must affirmatively perform, while process may be served on an official without his doing any act of any kind.

Now, in the light of the authorities cited above, since the repeal of the act of 1875, where can the secretary of state find any law requiring or compelling him to accept service for any foreign life insurance company? The authority filed with the insurance commissioner by appellee, under the act of 1875, was not and could not operate as a personal authority to the individual filling the office of secretary of state when this suit was brought. Under the act of 1875 when the written authority was filed by the foreign life insurance company, then it became the official duty of the secretary of state to accept service and notify the company in whose behalf he accepted it of the existence of the suit.

These were official acts, made incumbent upon him by the statute itself. He was bound to perform these acts, not by reason of the authority filed with him, but because of the express command of the statute. With the statute repealed, there is no duty of any kind imposed upon him. As shown above, the repeal of a statute authorizing or directing a course of proceedings by a public official even destroys the power to complete and carry out the proceedings which were instituted before the repeal of the act.

It is said that when appellee filed its power of attorney under the act of 1875 a contract was thereby consummated and completed between it and the State, and the State had

no power thereafterward to disregard this contract and provide that service should be had upon another person as agent of appellee.

This, it seems to us, is a very remarkable doctrine. It is certainly not supported by any of the authorities cited for it in appellee's brief. It is the first time we have ever heard the theory advanced that these statutes providing the manner in which service may be had upon foreign corporations constitute contracts between the State and the corporations.

If this proposition were sound, then the State could not require any foreign life insurance company which had complied with the act of 1875 to comply with any new act which the legislature might see fit to pass regulating the manner in which such companies might thereafter do business in this State.

Take the act of 1895. According to this argument, no company, life or fire, which had complied with the acts of 1873 and 1875 could be required to comply with this act. We respectfully submit that such a proposition cannot be sustained.

The State has the same right to change the terms and conditions upon which it allows foreign insurance companies to do business within its limits as it had to originally impose terms and conditions upon such companies. Suppose the office of the secretary of state were abolished, what would be the result? If the act of 1875 constitutes a contract between the companies complying with it and the State, then the people of the State could not abolish the office of secretary of state, so far as said companies were concerned, nor could the State itself require of the companies which had complied with said act to designate any new agent for service of process. The fact that the act of 1875 required the companies complying with it to consent that in case they ceased to transact business in the State the secretary of state should be considered as a continuing agent to accept service does not affect the position for which we contend, because, as

shown by the authorities above, when that act was repealed every part of it fell, and it was abrogated as completely as if it had never existed. This continuing authority of the secretary of state to accept service depended entirely upon the act itself. No company or individual could impose duties on the secretary of state. Duties can only be imposed upon him by law, and when this suit was brought the legislation on this subject stood just as if the act of 1875 never had been passed. But even if the repeal of the act of 1875 did not revoke or annul the power of attorney and the secretary of state continued to be the agent of plaintiff in error, yet it would not follow, as pointed out by the supreme court of Tennessee in its opinion in this case (Record, p. 44), that the service in this case was void. The only result would be that defendant in error might have proceeded in either of two ways—one by service on the secretary of state, the other by service under the act of 1887.

II

Counsel for the insurance company, the plaintiff in error, insisted that this case was not embraced within the terms and intent of the act of 1887. We have already argued that this point cannot be raised under the pleadings. If the court, however, should be of the opinion that it is embraced in the pleadings, then in reply to what is said for the insurance company we submit the following considerations:

Counsel for the insurance company said that the history and intensive language of the act of 1887 clearly showed that its provisions were intended to catch a class who were defrauding the State. He said it was to catch a class doing business surreptitiously in the State and to hold them by service of process.

Now, when the present statutes regulating the manner in which the business of life insurance is to be conducted in

this State are examined, it will be seen that this insurance company, the plaintiff in error, is enjoying the profits of contracts made in this State under the protection of its laws, without bearing the burdens which are imposed by the State upon the business out of which those contracts grew.

Section 19, chapter 160, of the Acts of 1895 requires every foreign insurance company to report, under oath, the amount of gross premiums received in this State within the six months preceding the first of January and July, or since the last return of such premiums were made by such company, and further requires it at the same time to pay into the treasury of the State the sum of $2.50 upon each $100 of said gross premiums so ascertained.

Now, plaintiff in error has a large number of outstanding policies in this State which it obtained under the protection of the laws of this State. Every life insurance company which has complied with the terms of chapter 160 of the Acts of 1895 pays this $2.50 per hundred on all premiums it receives in this State, yet plaintiff in error collects its premiums and refuses to pay this tax. This is shown in the correspondence between appellee and the insurance department, all of which will be found in the record. The result is plaintiff in error, as far as it can, according to its own admissions, has withdrawn the authority it gave authorizing the secretary of state to accept service of process. The law requiring the secretary of state, under such authority, to accept service has been repealed. Appellee does not seek to do new business in Tennessee, it says, but quietly reaps the benefit of all the business heretofore done without paying the revenue which is levied by the State upon exactly the same kind of business done by other companies, and in this attitude it says it cannot be sued on a policy issued in this State in the courts of this State.

In the Kosminsky case already cited the sending of one policy of insurance to a citizen of Arkansaw by a Tennessee insurance company was held by the court to be doing busi-

ness in the State of Arkansaw. So, too, a single act making one loan of money, and taking a mortgage to secure it by a foreign company engaged in the business of lending money, was held to be doing business within the provisions of the Alabama constitution prohibiting foreign corporations from doing any business in the State without having at least one place of business and an authorized agent.

Farrior *vs.* New England Mortgage Co., 88 Ala., 275; 7 So. Reporter, 200.

Christian *vs.* Am. Freehold Loan and Mortgage Co., 89 Ala., 198; 7 So. Reporter, 427.

Ginn *vs.* New England Mortgage Co., 92 Ala., 135; 8 So. Rep., 388.

It seems to us that the system adopted by our State with reference to foreign corporations is both wise and complete.

The act of 1887 is broad in its terms and may embrace every kind of foreign corporation found doing any business in Tennessee. Then, from time to time there have been acts with reference to particular corporations. If these latter acts are not complied with, then the non-complying companies at which they are directed would fall within the scope of the act of 1887.

Again, if any of these acts were repealed, the particular class of corporations to which they applied, while in existence, would also fall within the scope of the act of 1887. So thus it is the courts of Tennessee under these acts can be invoked for relief against foreign corporations in all controversies or suits growing out of contracts made or business done within the State.

III.

Counsel for the insurance company, plaintiff in error, in that portion of his brief which was devoted to showing that the act of 1887 was unconstitutional, insisted that Chaffee, upon whom the writ was served in the circuit court proceedings, was not an agent of appellee upon whom legal process could be served. He said further that no State can arbitrarily provide for the service of process upon such an agent as Chaffee was, or, to quote his own language, "upon any agent, no matter what character of agent he may be."

We have in our main brief noticed most of the authorities cited for appellee on this point. The general rule is that the State itself can select the kind and character of agent upon whom process may be served. The only limitation is that such selection must not encroach upon that principle of natural justice which requires notice of suit to a party before he can be bound by it.

Mr. Murfree, in his late work on Foreign Corporations, section 215, says:

"There is a great variety among the statutory provisions which designate the character of the agent of the foreign company upon whom service of process is to be made, and the determination of the question as to the sufficiency of the service will necessarily depend upon the language of the particular statute and the facts of the particular case. The purpose of such provisions being to insure the giving of due notice to the corporation, that idea is given prominence in all the decisions interpreting them; consequently the general rule, as far as there can be said to be any, in such cases is that if the person served sustain sufficient character and rank to render it reasonably certain that the corporation would be apprised of the service, the requirement of the statute is answered. Under the New York Code authorizing service in certain circumstances on the cashier, service on one who receives money for goods sold by the company in the State has been held sufficient."

McCulloh *vs.* Paillard, 14 N. Y. Supp., 491.

Service on a section foreman of a railroad has been held good under a statute authorizing service on a local superintendent of repairs.

St. Louis R. R. *vs.* Deford, 38 Kan., 299.

And service on a conductor is good under a statute authorizing service on a special agent of a railroad company.

New Albany R. R. *vs.* Grooms, 9 Ind., 243.

National R. R. Co. *vs.* Tilton, 12 Ind., 3.

And service upon a subagent of the general agent has been held sufficient.

Burgess *vs.* Aultman, 80 Wis., 292.

Certainly Chaffee's relations to plaintiff in error were such as to insure that appellee would have notice of the suit. He was the agent to investigate the nature and character of the claim made by the defendant in error. He not only had to investigate, but he had to report, and it was his duty to report everything that occurred while he was making the investigation. Certainly he would have been negligent in the performance of his duties if he had failed to inform plaintiff in error that he had been served with process on its behalf. But the statute itself does not rest with the probability of notice reaching the company through its agent; it meets the requirement of natural justice referred to by Judge Field in St. Clair *vs.* Cox, *supra*, by requiring the clerk of the court as well as the attorney of the plaintiff to send written notice to the company sued of the pendency of the suit.

Amongst other cases cited for appellee on this branch of the discussion is—

Phillips *vs.* Ins. Co., 62 Iowa, 633.

As quoted in the brief for appellee, this was a case where the insurance company, under the statute, had appointed an agent on whom process might be served, and the service was had on another agent not contemplated by the statute.

Certainly this is a very different case from the one at bar. Here the service was had on the proper agent, and actual notice was brought home to appellee.

The case of R. R. *vs.* Walker, 9 Lea, 475, gives but little aid in determining the questions here involved. The service was held bad in that case because it was not made upon an officer or agent designated by the statutes then in existence.

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